

CAUSE NO. 18 DCR 0152

By:  Deputy

STATE OF TEXAS § IN THE DISTRICT COURT
 §
vs. § 344th JUDICIAL DISTRICT
 §
ZENA COLLINS STEPHENS § CHAMBERS COUNTY, TEXAS

**STATE'S RESPONSE TO DEFENDANT'S PRETRIAL WRIT OF HABEAS CORPUS
AND BRIEF IN SUPPORT OF INDICTMENT**

TO THE HONORABLE JUDGE OF SAID COURT:

THE STATE OF TEXAS, by and through the undersigned Assistant Attorney General, files this brief response to Defendant's Pretrial Writ of Habeas Corpus and Brief in Support of Indictment in the above cause.

STATEMENT OF RELEVANT FACTS

The facts relevant to the issue at bar are that, Zena Collins Stephens (hereafter "Defendant"), stands indicted by the duly selected, organized, sworn, and impaneled grand jury of Chambers County, Texas on April 26, 2018. (Exhibit A). Count I of aforementioned indictment alleges:

On or about the 11th day of October, 2016 in Jefferson County, Texas, a county adjoining Chambers County, Texas and before the presentment of this indictment, Zena Collins Stephens, with intent to defraud or harm another, namely: the Jefferson County Clerk or Jefferson County or the citizens of Jefferson County, Zena Collins Stephens did present or use a record or document, namely: a Candidate / Officeholder Campaign Finance Report, by reporting a \$5,000.00 individual cash contribution in the political contributions of \$50.00 or less section of said Report, with knowledge of its falsity and with intent that it be taken as a genuine governmental record.

The offense alleged is a violation of Section 37.10(a)(2) Texas Penal Code.

SUMMARY OF THE ARGUMENTS

First, Defendant avers that Count I of the indictment in violation of Section 37.10(a)(2) Texas Penal Code was not the act of a proper grand jury nor was it presented in the proper court in violation of Article 21.02(3) and (5) of the Texas Code of Criminal Procedure. Furthermore, Defendant argues that there is no statutory provision permitting a charge under Section 37.10(a)(2) Texas Penal Code to be prosecuted in an adjoining county.

Second, Defendant claims the Texas Office of the Attorney General does not have the Constitutional or statutory authority to prosecute Count I of the indictment alleging Tampering with a Governmental Record in violation of Penal Code Section 37.10. Alternatively, if the Texas OAG did have the authority to prosecute said allegation, it must be initiated in Jefferson County. This claim is based on an incomplete reading of both the Texas Election Code and Penal Code. Defendant's indictment in Count I is statutorily authorized to be prosecuted by the Attorney General as a violation of **election laws** and the Attorney General is statutorily authorized to prosecute the offense in the county in which it occurred or an adjoining county, thus conferring jurisdiction upon this Court.

Third, Defendant maintains that "as applied," the Election Code (presumably Section 273.024 Election Code) violates the 6th and 14th Amendments of the U.S. Constitution as well as the Separation of Powers Clause of the Texas Constitution because it allows for venue to be determined after a consideration of the substantive allegations as opposed to being predetermined as contemplated by the Constitutions. Defendant's argument regarding the Texas Constitution is based on too narrow a reading of the Texas Constitution and ignores the well-recognized and long-standing authority of the Legislature to reasonably allocate the duty to represent the State in trial courts. Because the Attorney General is statutorily authorized to prosecute Count I as

alleged in the indictment, Defendant's habeas application raises no constitutional right that includes right to avoid trial.

Fourth, Defendant contends that facially, Section 273.024 Election Code, violates the 6th and 14th Amendments of the U.S. Constitution because it does not identify who makes the decision regarding the location of the initiation of prosecution, and because there is no methodology for the selection of any particular county. Defendant's reading and/or comprehension of Section 273.024 of the Texas Election Code is factually incorrect. Further, unless the 1st Amendment is implicated, which it is not in the present case, a facial vagueness challenge can succeed only if shown that the law is unconstitutionally vague in all applications, which Defendant has wholly failed to show.

Fifth, Defendant asserts the indictment lacks necessary language, specifically, "knowing that acceptance of the contribution" violated the Texas Election Code, an omission requiring the indictment be quashed. However, Defendant relies on a statute under which she is not currently indicted and makes an argument that is completely misaligned with the indictment.

ARGUMENT

I. STATE'S REPLY TO ARGUMENTS ONE AND TWO

Defendant claims that Count I of the indictment in violation of Section 37.10(a)(2) Texas Penal Code was not the act of a proper grand jury, not presented in the proper court, and that this Court has no jurisdiction over that allegation which would violate Article 21.02(3) and (5) of the Texas Code of Criminal Procedure. Put simply, that the indictment is the act of a grand jury of the proper county and the place where the offense was committed is within the jurisdiction of the Court. However, Defendant's indictment in Count I is statutorily authorized to be prosecuted by the Attorney General as a violation of *election laws* and the Attorney General is statutorily

authorized to prosecute the offense in the county in which it occurred or an adjoining county, thus conferring jurisdiction upon this Court.

Texas Election Code Section 273.021(a)¹ allows the Attorney General to prosecute a criminal offense prescribed by the *election laws* of this state. (Emphasis Added). The Secretary of State shall obtain and maintain uniformity in the application, operation, and **interpretation of this code** and of the *election laws outside this code*. Tex. Elec. Code Section 31.003 (Emphasis Added). The plain language of Section 31.003 indicates the legislature envisioned laws falling outside of the Election Code, but still being “*election laws*” which would also be governed by Chapter 273 Texas Election Code, a position supported by both the Texas Supreme Court and the United States Court of Appeals for the Fifth Circuit. *Lightbourn v. City of El Paso, Tex.*, 118 F.3d 421, 429 (5th Cir. 1997); *In re Sanchez*, 81 S.W.3d 794, 800 (Tex. 2002), *as supplemented on denial of reh'g* (Aug. 29, 2002). Further support is clear by the definition of “law” as provided by the Election Code to mean a constitution, statute, city charter, or city ordinance. Tex. Elec. Code Section 1.005(10).²

Defendant was indicted for Tampering with a Governmental Record, in violation of Section 37.10 Texas Penal Code, a statute. A “**governmental record**” means an official ballot or other *election record*. Tex. Penal Code § 37.01(2)(E). (Emphasis Added). In keeping with its

¹ Sec. 273.021. **Prosecution by attorney general authorized** is the title of section 273.021. The section is listed under Subchapter B. **Prosecution by Attorney General**

² For example, the following is a non-comprehensive list of election laws found outside of the Election Code: Theft § 31.03(3)(4)(E) where the property stolen is an **official ballot or official carrier envelope for an election**; Bribery § 36.02(a)(2) any benefit as consideration for the recipient’s decision, vote, recommendation, or other exercise of official discretion in a judicial or administrative proceeding; Coercion of Public Servant or Voter § 36.03(a)(2) influences or attempts to influence a voter not to vote or to vote in a particular manner; Tampering with a Governmental Record § 37.10(a)(2) defining Governmental Record in § 37.01(2)(E) “Governmental Record” means: an official ballot or other election record; Places Weapons Prohibited § 46.03(a)(2) on the premises of a polling place on the day of an election or while early voting is in progress; Gambling § 47.02(a)(2) makes a bet on the result of any political nomination, appointment or election or on the degree of success of any nominee, appointee, or candidate.

legislative mandate of maintaining uniformity pursuant to Section 31.003, the Secretary of State interprets Section 37.10 Texas Penal Code to be an *election law* outside of the Election Code when it involves an **election record**. Tex. Elec. Code § 31.003. (Emphasis Added).

In the case at bar, Defendant stands indicted under § 37.10 as follows:

On or about the 11th day of October, 2016 in Jefferson County, Texas, a county adjoining Chambers County, Texas, and before the presentment of this indictment, Zena Collins Stephens, with intent to defraud or harm another, namely: the Jefferson County Clerk or Jefferson County or the citizens of Jefferson County, Zena Collins Stephens did present or use a *record* or document, namely: a *Candidate / Officeholder Campaign Finance Report*, by reporting a \$5,000.00 individual cash contribution in the political contributions of \$50.00 or less section of said *Report*, with knowledge of its falsity and with intent that it be taken as a genuine *governmental record*.

(Exhibit A) (Emphasis Added). This indictment was handed down by the duly selected, organized, sworn, and impaneled grand jury of Chambers County, Texas on April 26, 2018.

As discussed *supra*, Section 273.021 allows the Attorney General to prosecute criminal offenses prescribed by the *election laws* of the State of Texas. Additionally, the Attorney General may appear before a grand jury in connection with an offense the Attorney General is authorized to prosecute. Tex. Election Code Section 273.021(b). This authority additionally allows for the Attorney General to prosecute offenses prescribed by the *election laws* of the State of Texas in the county in which the offense was committed *or an adjoining county*. Tex. Election Code Section 273.024.³ (Emphasis Added). By virtue of the statutory provisions contained within the Election

³ Sec. 273.024. **Venue.** An offense under this subchapter may be prosecuted in the county in which the offense was committed or an adjoining county. If the offense is committed in connection with a statewide election, the offense may be prosecuted in the county in which the offense was committed, an adjoining county, or Travis County. The statute uses the term “offense under this subchapter”. The term “offense” is used three more times in 273.024. The term is general to election laws and is not limited to statutes just in the Election Code. The subchapter is B. Prosecution by Attorney General. Sec. 273.021. **Prosecution by attorney general authorized.** (a) The attorney general may prosecute a criminal offense prescribed by the **election laws** of this state.

Code allowing the Attorney General to prosecute criminal offenses prescribed by the *election laws* of the State of Texas, the description and definitions within Chapter 37 of the Texas Penal Code, and the statutorily imposed interpretation of the Secretary of State to maintain uniformity in the application, operation, and interpretation of the **Election Code and of the *election laws* outside the Election Code**, Count I of Defendant's indictment was properly investigated, and presented to the duly selected, organized, sworn, and impaneled grand jury of Chambers County, a county adjoining Jefferson County, and this Court has jurisdiction over that offense.

II. STATE'S REPLY TO ARGUMENT THREE

Defendant maintains that "as applied," the Election Code violates the 6th and 14th Amendments of the U.S. Constitution as well as the Separation of Powers Clause of the Texas Constitution because it allows for venue to be determined after a consideration of the substantive allegations as opposed to being predetermined as contemplated by the Constitutions. Defendant's argument regarding the Texas Constitution is based on too narrow a reading of the Texas Constitution and ignores the well-recognized and long-standing authority of the Legislature to reasonably allocate the duty to represent the State in trial courts. Because the Attorney General is statutorily authorized to prosecute Count I as alleged in the indictment, and the statutory authority for such prosecution is not a violation of the Separation of Powers Clause of the Texas Constitution, Defendant's habeas application raises no constitutional right that includes right to avoid trial.

Defendant's initial complaint regarding the Separation of Powers Clause of the Texas Constitution is based on too narrow of a reading of Article II, Section I of the Texas Constitution and ignores the well-recognized and long-standing authority of the Legislature to reasonably allocate the duty to represent the State in trial courts.

Defendant argues that the Office of the Attorney General of Texas has never had authority to initiate a criminal prosecution. (Defendant's Writ P.4). Defendant continues to argue "it has had no general authority to represent the State in a criminal case in any court, except when a county or district attorney requests the attorney general to assist; and even then, only under limited circumstances." (Defendant's Writ P.4).⁴ Defendant claims the current Constitution gives the authority to prosecute criminal cases to the county attorneys, criminal district attorneys, and district attorneys under the regulation of the legislature. (Defendant's Writ P.3). Defendant goes on to say the Office of the District Attorney lies in the judicial branch of government, while the Office of the Attorney General is in the executive branch. (Defendant's Writ P.3-4). Defendant continues by saying that the Office of the Attorney General has never had authority to initiate a criminal prosecution (Defendant's Writ P.4), and concludes that the Attorney General has no authority to prosecute Count I.

The Office of the Attorney General was created in the Texas Constitution and its duties and powers are set forth:

The Attorney General shall represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party, and shall especially inquire into the charter rights of all private corporations, and from time to time, in the name of the State, take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power or demanding or collecting any species of taxes, tolls, freight or wharfage not authorized by law. He shall, whenever sufficient cause exists, seek a judicial forfeiture of such charters, unless otherwise expressly directed by law, and give legal advice in writing to the Governor and other executive officers, when requested by them, **and perform such other duties as may be required by law.**

Tex. Const. art. IV, § 22. (Emphasis Added). The bolded portion of section 22 authorizes the

⁴ This rather myopic view ignores the provisions of Article 2.07 Texas Code of Criminal Procedure allowing for the appointment of an Attorney *Pro Tem*, which may also be an Assistant Attorney General. Additionally, it ignores the Texas Government Code, Chapter 43 "District Attorneys" Subchapter B "Provisions Applicable to Specific Districts" wherein District Attorneys are entitled to appoint Assistant District Attorneys.

expansion of the Attorney General's duties, including the duty to represent the State in trial Court. *Brady v Brooks*, 89 S.W. 1052 (Tex. 1905) (“[W]e are of the opinion that the legislature had the power to create causes of action in favor of the state and to make it the exclusive duty [of the Attorney General] to prosecute such suits.”); *Meshell v. State*, 739 S.W.2d 246, 254 (Tex. Crim. App. 1987); *El Paso Electric Co. v. Tex. Dep't of Ins.*, 937 S.W.2d 432, 439 (Tex. 1996); *Medrano v. State*, 421 S.W.3d 869, 878-879 (Tex. App.-Dallas 2014)⁵. Defendant takes issue in this case with the Legislature's delegation of the authority to the Attorney General. Tex. Elec. Code § 273.021(a) (“The attorney general may prosecute a criminal offense prescribed by the *election laws of this state.*”) (Emphasis Added).

Additional examples of the Legislature delegating the duty to represent the state at the trial level to the Attorney General abound. See, e.g., Tex. Penal Code § 35A.02(f) (“...the attorney general has concurrent jurisdiction with [the] consenting local prosecutor to prosecute an offense ... that involves the Medicaid program.”); Tex. Civ. Prac. & Rem. Code § 101.103(a) (“The attorney general shall defend each action brought under this [tort claims] chapter against a governmental unit that has authority and jurisdiction coextensive with the geographical limits of this state.”); Tex. Gov't Code § 492.010 (“The attorney general shall represent [Texas Board of Criminal Justice for the collection and enforcement of demands and debts owed].”); Tex. Prop. Code § 71.303 (“[T]he attorney general ... shall represent the interests of the state [in a suit for escheated real property].”). And, although neither the Supreme Court nor the Court of Criminal appeals have squarely held that the Attorney General may be required to prosecute a criminal

⁵ Medrano won the March 2010 Dallas County Democratic Party Primary Election for the office of Precinct 5, Place 1 Justice of the Peace, defeating the incumbent Luis Sepulveda by 156 votes. Shortly after the election, allegations of voter fraud surfaced and Sepulveda filed a civil lawsuit. The AG's Office investigated the complaint, which included the allegation that some members of the Medrano family had registered voters to vote in the JP election who did not reside in that precinct. The AG's Office presented the case to the Rockwall County grand jury, which ultimately indicted eight members of the Medrano family, including Carlos Medrano.

matter in the trial courts, dicta from the Court of Criminal Appeals indicates that it would be authorized. *Saldano v. State*, 70 S.W.3d 873, 880 (Tex. Crim. App. 2002) (“The Constitution ... authorizes the legislature to give the attorney general duties which, presumably, could include criminal prosecution.”). *Medrano*, S.W.3d at 879.

Defendant’s argument is premised on the notion that county and district attorneys fall squarely into the judicial branch and the Attorney General into the executive branch. But our courts have acknowledged otherwise. *Medrano*, S.W.3d at 879. For instance, in *Meshell*, the court noted that some duties of county and district attorneys might more accurately be characterized as executive in nature. *Meshell* 739 S.W.2d at 253 n. 9. Likewise, in *Brady*, the Texas Supreme Court determined that the duties imposed upon the Attorney General are both executive and judicial. *Brady*, 89 S.W. at 1056.

Our courts have long recognized the legislature may have sound reasons for having a statewide agency pursue some claims in place of the district or county attorney. *See Brady*, 89 S.W. at 1056. The *Medrano* court concluded that legislature’s enactment of chapter 273 does not delegate a power to one branch that is more properly attached to another nor does it allow one branch to unduly interfere with another and does not violate the separation of powers doctrine. *Medrano*, S.W.3d at 880.

Defendant has also raised an as-applied challenge with this point of argument. However, an as-applied challenge may not be brought pretrial either by habeas (*Ex parte Ellis*, 309 S.W.3d 71 (Tex. Crim. App. 2010) or motion to quash the indictment. *Gillenwaters v. State*, 205 S.W.3d 534 (Tex. Crim. App. 2006). An as-applied challenge depends upon the evidence adduced at a trial or hearing. The State is entitled to writs of mandamus or prohibition to bar pretrial hearing on as-applied challenges. *State ex rel. Lykos v. Fine*, 330S.W.3d 904 (Tex. Crim. App. 2011).

Defendant relies on *Ex parte Weise*, 55 S.W.3d 617 (Tex. Crim. App. 2002) as authority for a hearing in her pretrial writ of habeas corpus in this case. The allegation that Section 273.024 Texas Election Code is unconstitutional as-applied is also a misdirection play by Defendant, because in order to be unconstitutional as-applied, Defendant must concede that the State's interpretation of the statute is correct in authorizing prosecution as indicted in Count I in order for their vagueness challenge *infra* to succeed. *See Generally Ex parte Ellis*, 309 S.W.3d at 77. Even following Defendant's proposed argument path, she must show her claim to be cognizable on habeas. Defendant claims her allegation is cognizable on two grounds: 1) Defendant is restrained of her liberty; and 2) that a resolution favorable to Defendant would result in the trial court's inability to proceed, and consequently, in the immediate release of Defendant. (Defendant's Writ P. 2).

As to the first potential ground, that Defendant is restrained of her liberty, the State concedes that pursuant to *Ex parte Robinson*, 641 S.W.2d 552, 553 (Tex. Crim. App. 1982), a person who is subject to the conditions of a bond is restrained in his liberty within the meaning of Article 11.01 of the Texas Code of Criminal Procedure. However, if this were the only cognizable ground on which Defendant could rely, a pretrial writ of habeas corpus would be the improper avenue through which to seek relief. Defendant also stands charged with two additional criminal violations in Counts II and III of the indictment containing Count I. Counts II and III are as follows:

Count II

On or about and between the 23rd day of May, 2016 and the 25th day of May, 2016 in Jefferson County, Texas, a county adjoining Chambers County, Texas, and before the presentment of this indictment, Zena Collins Stephens, while a candidate, did then and there, knowingly accept from a contributor, namely: Larry Tillery, In a reporting period a political contribution in cash that exceeded \$100, namely: \$1,000.00 in cash,

Count III

On or about and between the 27th day of September, 2016 and the 28th day of September, 2016 in Jefferson County, Texas, a county adjoining Chambers County, Texas, and before the presentment of this indictment, Zena Collins Stephens, while a candidate, did then and there, knowingly accept from a contributor, namely: Larry Tillery, In a reporting period a political contribution in cash that exceeded \$100, namely: \$5,000.00 in cash,

(Exhibit A). Each of these charges constitute a Class A misdemeanor in violation of Texas Election Code Section 253.033. As a candidate for sheriff of Jefferson County at the time of the alleged offenses, Defendant was a public servant. Tex. Pen. Code § 1.07(41)(E). As a public servant, the allegations would be official misconduct and district courts (this Court) **shall** have original jurisdiction. Tex. Code Crim. Proc. art. 3.04; Tex. Code Crim. Proc. art. 4.05; (Emphasis Added). Therefore, even if, assuming arguendo, Defendant's "as-applied" claim is cognizable with respect to Count I, it would not be cognizable with respect to either Count II or Count III. No claim is before this court regarding the constitutionality of the statutes relied on in Counts II and III nor is there a challenge to the jurisdiction of the Attorney General to prosecute those counts whether in Jefferson County, Chambers County, or any other county adjoining Jefferson County. Therefore, in determining whether an issue is cognizable on habeas, the court must look at whether the alleged defect would bring into question the trial court's power to proceed. *Ex parte Weise*, 55 S.W.3d at 619. Along those lines, the Court of Criminal Appeals has found that a pretrial writ application is not appropriate when resolution of the question presented, even if resolved in favor of Defendant, would not result in immediate release. *Id.* As discussed *supra*, even a favorable finding with respect to Count I would not result in Defendant's immediate release as there are two remaining counts.

Even if Defendant asserts that the Court of Criminal Appeals has permitted pretrial habeas challenges to the constitutionality of statutes under which a defendant is restrained of his liberty

and, therefore, his claim is likewise cognizable is a matter also addressed by the court in *Weise*. *Id.* at 620. “We have long held that when there is a valid statute or ordinance which a prosecution may be brought, habeas corpus is generally not available before trial to test the sufficiency of the complaint, information, or indictment.” *Id.* Defendant’s argument is fatally flawed in two ways. First, as discussed *supra*, the Attorney General is statutorily authorized to prosecute Count I as a violation of an *election law* as well as to select among the statutorily authorized venues. Second, even if, for the sake of argument only, this Court found the Attorney General to lack the jurisdiction to bring the allegation in Count I, Counts II and III remain. Therefore, even a favorable finding with respect to Count I would not result in Defendant’s immediate release.

III. STATE’S REPLY TO ARGUMENT FOUR

Defendant contends that facially, Section 273.024 Election Code, violates the 6th and 14th Amendments of the U.S. Constitution because it does not identify who makes the decision regarding the location of the initiation of prosecution, and because there is no methodology for the selection of any particular county.⁶ The Code of Criminal Procedure is filled with examples of venue determination that would fail if Defendant’s standard were applied. Moreover, there are examples even within the Code of Criminal Procedure where venue is determined by statutes residing outside of the Code of Criminal Procedure. An offense under Section 841.085, Health and Safety Code, may be prosecuted in the county in which any element of the offense occurs or in the court that retains jurisdiction over the civil commitment proceeding under Section 841.082,

⁶ *But see* Tex. Code Crim. Proc. art. 13.13 Conspiracy, which may be prosecuted in the county where the conspiracy was entered into, in the county where the conspiracy was agreed to be executed, or in any county in which one or more of the conspirators does any act to effect an object of the conspiracy, or in Travis County, with no mention of “who” or “methodology.” *See also* Tex. Code Crim. Proc. art 13.30 Fraudulent, Substandard, or Fictitious Degree which may be prosecuted in the county in which an element occurs or in Travis County, again with no mention of “who” or “methodology.” *See also* Tex. Code Crim. Proc. art 13.34 Certain Offenses Committed Against a Child Committed to the Texas Juvenile Justice Department which may be prosecuted in any county in which an element of the offense occurred or Travis County, yet again with no mention of “who” or “methodology.”

Health and Safety Code. Money laundering may be prosecuted in the county in which the offense was committed as provided by Article 13.18 or, if the prosecution is based on a criminal offense classified as a felony under the Tax Code, in any county in which venue is proper under the Tax Code for the offense. Code Crim. Proc. art 13.35. Defendant's argument is premised upon a mistaken belief that the Code of Criminal Procedure lists each and every possible venue determination for a criminal offense against the laws of the State of Texas.

In its enactment of the various statutes of the Texas Election Code for violations of *election laws*, the Legislature has included venue provisions much like those in the examples *supra*. Defendant's reading and/or comprehension of Section 273.024 of the Texas Election Code is factually incorrect. Further, Unless the 1st Amendment is implicated, which it is not in the present case, a facial vagueness challenge can succeed only if shown that the law is unconstitutionally vague in **all applications**, which Defendant has wholly failed to show. *Ex parte Ellis*, 309 S.W.3d at 86. (Emphasis Added).

Chapter 273 of the Election Code, entitled "Criminal Investigation and Other Enforcement Proceedings," particularly subchapter B where Section 273.024 is found, specifically identifies the Attorney General as the agency who may prosecute. *See also* Tex. Elec. Code § 273.021(a) ("The **attorney general** may prosecute a criminal offense prescribed by the *election laws* of this state.") (Emphasis Added). Further, the title of Subchapter B. is "Prosecution by the Attorney General." Read in relevant part in conjunction with Section 273.024, which provides "**an offense** under this subchapter may be prosecuted in the county in which the **offense** was committed or **an adjoining county**," is a clear indication that the Attorney General makes the decision regarding the location of the initiation of prosecution. Tex. Elec. Code § 273.024. (Emphasis Added). In order to show the statute is unconstitutionally vague, Defendant would have to show its prohibitions are not

clearly defined, *State v. Markovich*, 77 S.W.3d 274 (Tex. Crim. App. 2002). The statute must: 1) provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits; 2) have explicit guidelines for those who enforce them; and if 1st Amendment freedoms are involved, 3) be sufficiently definite to avoid chilling expression. *Id.*

The statute at issue discussing venue via the Attorney General's jurisdiction, is not a prohibitive statute, thus, prohibited conduct is not applicable. Nor does this case or statute involve 1st Amendment freedoms, therefore, sufficiently definite to avoid chilling expression is not applicable. This leaves only having explicit guidelines for those who enforce the statute. A facial vagueness challenge can succeed only if shown that the law is unconstitutionally vague in all applications. *Ex parte Ellis*, 309 S.W.3d at 80; *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), (which set forth the standard). As discussed *supra*, reading Sections 273.021 and 273.024 together gives the Attorney General jurisdiction and venue determination within prescribed, definite and explicit guidelines, thus defeating the allegation that the statute at issue is unconstitutionally vague. Moreover, Defendant has not and cannot show that in all applications, not just as presently applied, the statute would be unconstitutionally vague.

IV. STATE'S REPLY TO ARGUMENT FIVE

Defendant asserts the indictment lacks necessary language, specifically, "knowing that acceptance of the contribution" violated the Texas Election Code, an omission requiring the indictment be quashed. In support of her argument, Defendant cites *Fogo v. State*, 830 S.W.2d 592 (Tex. Crim. App. *En Banc* 1992). *Fogo* involved an attorney who was charged under Section 253.003(a) Texas Election Code for unlawfully **making** a contribution. In that case, the court held the conduct charged by **the donor** was not an offense against the penal laws of the state. *Fogo*, 830 S.W.2d at 596. Defendant now argues that if Section 253.003(a) is not an offense, conversely,

Section 253.003(b) concerning the recipient of the donation also must not be an offense. Section 253.003(a) reads “a person may not knowingly make a political contribution in violation of this chapter and Section 253.003(b) reads, “a person may not knowingly accept a political contribution the person knows to have been made in violation of this chapter.” Tex. Elec. Code § 253.003(a) and (b). The *Fogo* court would disagree with Defendant’s assertion that if “a” is not a crime, then neither is “b.” The *Fogo* Court further explained that criminal behavior is in section 253.033, the very statute that Defendant is charged with in Counts II and III. Explaining if the Legislature wanted to punish the donor of the political contribution then it would done so in section 253.033. *Id* at 595. In fact, the court in *Fogo* reasoned “[a] legislator reading those sections [253.003(a) and 253.003(b)] in a common-sense manner before voting on them would very probably have concluded that they placed potential criminal liability **on those who run political campaigns/candidates** and not on those who, sometimes naively, contribute to them. *Fogo*, 830 S.W.2d at 595.⁷ However, even though Defendant’s argument would fail under this scenario discussed, it is not relevant to the case at bar.

In the present case, Defendant stands indicted for violations of Section 253.033 Texas Election Code which reads, “a candidate, officeholder, or specific-purpose committee may not knowingly **accept** from a contributor in a reporting period political contributions in cash that in the aggregate exceed \$100.” Compare that language to the language in Counts II and III of the indictment:

Count II

On or about and between the 23rd day of May, 2016 and the 25th day of May, 2016 in Jefferson County, Texas, a county adjoining Chambers County, Texas, and before the presentment of this indictment, Zena Collins Stephens, while a candidate, did then and there, knowingly accept from a contributor, namely: Larry Tillery, In a reporting period a political contribution in cash that exceeded \$100,

⁷ Reinforcing the axiom “ignorance of the law is no excuse.” See *Generally Thompson v. State*, 26 Tex. App. 97, 9 S.W. 486 (Tex. App. 1888);

namely: \$1,000.00 in cash,

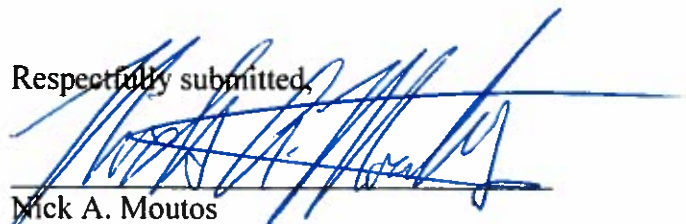
Count III

On or about and between the 27th day of September, 2016 and the 28th day of September, 2016 in Jefferson County, Texas, a county adjoining Chambers County, Texas, and before the presentment of this indictment, Zena Collins Stephens, while a candidate, did then and there, knowingly accept from a contributor, namely: Larry Tillery, In a reporting period a political contribution in cash that exceeded \$100, namely: \$5,000.00 in cash,

(Exhibit A). Plainly the statute relied upon by the State is not the one argued by Defendant. Moreover, the indictment tracks the statute, lists all of the elements of the offense, and provides even more specificity than is legally required. However, Defendant mistakenly relies on case law concerning Section 253.003(a) and (b) of the Texas Election Code rather than Section 253.033 of the Texas Election Code under which Defendant is indicted.

IN CONCLUSION, FOR ALL THESE REASONS, the State respectfully requests this Honorable Court deny Defendant's Pretrial Writ of Habeas Corpus and Deny Defendant's Motion to Quash the Indictment.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing State's Response to Defendant's Pretrial Writ of Habeas Corpus and Brief in Support of Indictment was provided to Russell Wilson II, Chad W. Dunn, and Sean Villery-Samuel, Attorneys for the Defendant, on this the 7th day of February, 2019.



Nick A. Moutos
Assistant Attorney General

EXHIBIT

A

Assigned to the 344th Judicial District Court

Cause No. 18DCR0152

Bond Amount: \$ _____

The State of Texas vs. Zena Collins Stephens

Count I: Felony Offense (SIF): Tampering with a Governmental Record - Penal Code Sec. 37.10

Count II: Misdemeanor Offense (A): Accepting a Cash Contribution exceeding \$100 - Election Code Sec. 253.033

Count III: Misdemeanor Offense (A): Accepting a Cash Contribution exceeding \$100 - Election Code Sec. 253.033

TRN:

SID:

TRUE BILL OF INDICTMENT

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

THE GRAND JURY, duly selected, organized, sworn and impaneled as such for the County of Chambers, State of Texas, at the JANUARY term, A.D. 2018, of the 344th Judicial District Court for said County, upon their oaths do present in and to said Court that,

COUNT I

on or about the 11th day of October, 2016 in Jefferson County, Texas, a county adjoining Chambers County, Texas, and before the presentment of this indictment, Zena Collins Stephens, with intent to defraud or harm another, namely: the Jefferson County Clerk or Jefferson County or the citizens of Jefferson County, Zena Collins Stephens did present or use a record or document, namely: a Candidate / Officeholder Campaign Finance Report, by reporting a \$5,000.00 individual cash contribution in the political contributions of \$50.00 or less section of said Report, with knowledge of its falsity and with intent that it be taken as a genuine governmental record,

COUNT II

on or about and between the 23rd day of May, 2016 and the 25th day of May, 2016 in Jefferson County, Texas, a county adjoining Chambers County, Texas, and before the presentment of this indictment, Zena Collins Stephens, while a candidate, did then and there, knowingly accept from a contributor, namely: Larry Tillery, in a reporting period a political contribution in cash that exceeded \$100, namely: \$1,000.00 in cash,

COUNT III

on or about and between the 27th day of September, 2016 and the 28th day of September, 2016 in Jefferson County, Texas, a county adjoining Chambers County, Texas, and before the presentment of this indictment, Zena Collins Stephens, while a candidate, did then and there, knowingly accept from a contributor, namely: Larry Tillery, in a reporting period a political contribution in cash that exceeded \$100, namely: \$5,000.00 in cash,

AGAINST THE PEACE AND DIGNITY OF THE STATE.

FILED
THIS THE 12 DAY OF April
A.D. 20 18 AT 2:42 O'CLOCK PM
PATTI L. HENRY
DISTRICT CLERK, CHAMBERS COUNTY, TEXAS
BY [Signature] DEPUTY

Rose Bolt

FOREMAN OF THE GRAND JURY

4-26-18

DATE

WITNESSES:

1. Brad Weatherford, Texas Ranger
2. Edward Keller
3. Marcia Guillory
4. Craig Andress